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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DENNIS CURTIS HISLE,)	Case No. 1:17-cv-01400-NONE-SAB (PC)
)	
Plaintiff,)	
)	FINDINGS AND RECOMMENDATIONS
v.)	REGARDING PARTIES' MOTIONS FOR
)	SUMMARY JUDGMENT
MARLYN CONANAN, et al.,)	
)	(ECF Nos. 127, 128)
Defendants.)	
)	

Plaintiff Dennis Curtis Hisle is appearing *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendant Ahmed’s motion for summary judgment, filed on September 11, 2020, and Plaintiff’s motion for summary judgment, filed on September 14, 2020. (ECF Nos. 127, 128.)

**I.
RELEVANT BACKGROUND**

This action is proceeding against Defendants Conanan and Ahmed for deliberate indifference to a serious medical need in violation of the Eighth Amendment.

Defendant Ahmed filed an answer to the complaint on October 30, 2019. (ECF No. 91.)

On November 1, 2019, the Court issued the discovery and scheduling order. (ECF No. 92.)

1 After Plaintiff amended the complaint, Defendant Ahmed filed an amended answer on April
2 29, 2020. (ECF No. 119.)

3 On September 11, 2020, Defendant Ahmed filed the instant motion for summary judgment.
4 (ECF No. 127.) On October 29, 2020, Plaintiff filed an opposition to Defendant Ahmed's motion for
5 summary judgment. (ECF No. 134.) Defendant Ahmed filed a reply on November 5, 2020. (ECF
6 No. 135.)

7 On September 14, 2020, Plaintiff filed a motion for summary judgment as to his claims against
8 Defendant Ahmed. (ECF No. 128.) On September 29, 2020, Defendant Ahmed filed an opposition to
9 Plaintiff's motion for summary judgment. (ECF No. 132.) Plaintiff filed a reply on October 19, 2020.
10 (ECF No. 133.)

11 II.

12 LEGAL STANDARD

13 Any party may move for summary judgment, and the Court shall grant summary judgment if
14 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.
16 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed
17 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including
18 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials
19 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot
20 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).
21 The Court may consider other materials in the record not cited to by the parties, but it is not required
22 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031
23 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

24 In resolving cross-motions for summary judgment, the Court must consider each party's
25 evidence. Tulalip Tribes of Washington v. Washington, 783 F.3d 1151, 1156 (9th Cir. 2015); Johnson
26 v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). A cross-motion for summary
27 judgment requires the court to apply the same standard and rule on each motion independently. Creech
28

1 v. N.D.T. Indus., Inc., 815 F. Supp. 165, 166–67 (D.S.C. 1993). When both parties have moved for
2 summary judgment, “[t]he granting of one motion does not necessarily warrant the denial of the other
3 motion, unless the parties base their motions on the same legal theories and same set of material
4 facts.” Stewart v. Dollar Fed. Sav. & Loan Ass’n, 523 F. Supp. 218, 220 (S.D. Ohio 1981) (citing
5 Schlytter v. Baker, 580 F.2d 848, 849 (5th Cir. 1978)). Plaintiff bears the burden of proof at trial, and
6 to prevail on summary judgment, he must affirmatively demonstrate that no reasonable trier of fact
7 could find other than for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007).
8 Defendant does not bear the burden of proof at trial and in moving for summary judgment, he need
9 only prove an absence of evidence to support Plaintiff’s case. In re Oracle Corp. Sec. Litig., 627 F.3d
10 376, 387 (9th Cir. 2010).

11 In judging the evidence at the summary judgment stage, the Court does not make credibility
12 determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984
13 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the light most
14 favorable to the nonmoving party and determine whether a genuine issue of material fact precludes
15 entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d at
16 942 (quotation marks and citation omitted).

17 In arriving at these Findings and Recommendations, the Court carefully reviewed and
18 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts
19 and responses thereto, if any, objections, and other papers filed by the parties. Omission of reference
20 to an argument, document, paper, or objection is not to be construed to the effect that this Court did
21 not consider the argument, document, paper, or objection. This Court thoroughly reviewed and
22 considered the evidence it deemed admissible, material, and appropriate.

23 III.

24 DISCUSSION

25 A. Summary of Plaintiff’s Complaint¹

26 Defendant M. Ahmed allowed Plaintiff to lay chained to his bed while in a continuous state of
27

28 ¹ The sets forth allegations relating only to Defendant Ahmed.

1 internal bleeding until the pleural hematoma opacity developed to a size that collapsed his lung. For
2 two weeks, Plaintiff bleed while under Dr. Ahmed's care, who told Plaintiff that he did not know what
3 to do with him and maybe should be send back to the prison. Plaintiff, bleed internally, for a period of
4 over one month from the date of injury before admission to a hospital that could correctly treat his
5 injury. Ahmed turned a blind eye to Plaintiff's suffering and immediate need for surgery.

6 **B. Plaintiff's Motion for Summary Judgment**

7 Plaintiff moves for summary judgment and argues it is undisputed that Dr. Ahmed oversaw
8 Plaintiff's guided aspiration attempt which failed causing greater significant injury and suffering.
9 Plaintiff expressed the increased significant pleuritic chest wall pain and difficulty breathing, but
10 Plaintiff was made to remain in a state of excruciating pain and shortness of breath for an additional
11 week.

12 Defendant Ahmed argues that Plaintiff's motion for summary judgment should be denied in its
13 entirety because Plaintiff has not established that there is no triable issue of material fact as to whether
14 or not he was deliberately indifference to a serious medical for Plaintiff.

15 1. Statement of Undisputed Facts

16 a. Mushtaq Ahmed M.D., you were the physician that dr. George, at P.V.S.P. spoke with
17 and arranged acceptance for plaintiff to Mercy Hospital. (Declaration of Plaintiff (Pl. Decl.), Ex. A.)

18 b. Mushtaq Ahmed M.D., upon admittance on 5-20-16, plaintiff had been received having
19 pneumonia. (Pl. Decl., Ex. B.)

20 c. Mushtaq Ahmed M.D., upon admittance on 5-20-16, plaintiff had been received having
21 atelectasis. (Pl. Decl., Ex. C.)

22 d. Mushtaq Ahmed M.D., upon admittance, plaintiff on 5-20-16, also presented having a
23 loculated pleural hematoma that measured up to 9.7 x 6.2 cm in axial plan and 11.6 cm in
24 craniocaudad dimension. (Pl. Decl., Ex. C1.)

25 e. Dr. Ahmed provided care and treatment to plaintiff over an approximate two week
26 period. (Pl. Decl., Ex. I.)

27 2. Analysis of Plaintiff's Motion

28 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical

1 care, the Eighth Amendment is violated only when a prison official acts with deliberate indifference to
2 an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled
3 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v.
4 Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).
5 Plaintiff “must show (1) a serious medical need by demonstrating that failure to treat [his] condition
6 could result in further significant injury or the unnecessary and wanton infliction of pain,” and (2) that
7 “the defendant’s response to the need was deliberately indifferent.” Wilhelm, 680 F.3d at 1122 (citing
8 Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective recklessness, which entails
9 more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted);
10 Wilhelm, 680 F.3d at 1122.

11 “A difference of opinion between a physician and the prisoner – or between medical
12 professionals – concerning what medical care is appropriate does not amount to deliberate
13 indifference.” Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989),
14 overruled in part on other grounds, Peralta, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122-23 (citing
15 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986). Rather, Plaintiff “must show that the course of
16 treatment the doctors chose was medically unacceptable under the circumstances and that the
17 defendants chose this course in conscious disregard of an excessive risk to [his] health.” Snow, 681
18 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal quotation marks omitted).). In addition,
19 “[m]edical malpractice does not become a constitutional violation merely because the victim is a
20 prisoner.” Estelle v. Gamble, 429 U.S. 97, 106 (1977); Snow v. McDaniel, 681 F.3d at 987-88,
21 overruled in part on other grounds, Peralta v. Dillard, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122.

22 Here, Plaintiff has failed to demonstrate that he is entitled to judgment as a matter of law. It is
23 undisputed that Defendant Dr. Mushtaq arranged for Plaintiff’s acceptance at Mercy Hospital. (PUdF
24 a.) When Plaintiff was admitted to Mercy Hospital on May 20, 2016, he presented with pneumonia
25 and atelectasis. (PUdF b-c.) Plaintiff also presented having a loculated pleural hematoma that
26 measured up to 9.7 x 6.2 cm in axial plan and 11.6 cm in craniocaudad dimension. (PUdF d.) Dr.
27 Ahmed provided care and treatment to plaintiff over an approximate two week period. (PUdF e.)
28

1 In opposition, Defendant submits that the declaration of Dr. Andrew Wachtel establishes that
2 Dr. Ahmed met the applicable standard of care in providing medical care and treatment to Plaintiff,
3 and Dr. Ahmed was not deliberately indifferent in any aspect of his involvement in Plaintiff's care and
4 treatment.

5 Dr. Wachtel declares, after review of the relevant medical records, that "it is my professional
6 opinion that Dr. Mushtaq Ahmed fully and completely met the applicable standard of care for a
7 physician specializing in the field of Internal Medicine as it relates to the care and treatment he
8 provided to [Plaintiff] between May 20, 2016 and June 30, 2016. It is also my opinion that, to a
9 reasonable degree of medical probability, there is nothing Dr. Ahmed either did or did not do that
10 played a substantial factor in causing any injury, harm, or damage to [Plaintiff]." (Declaration of
11 Andrew Wachtel (Wachtel Decl.) ¶ 7.)

12 Plaintiff argues as follows:

13 For Dr. Ahmed to have not prepared a 'plan of action' if aspiration failed, leading to greater
14 significant bleeding and excruciating pain for plaintiff is at minimal gross negligence. But
15 when Dr. Ahmed's, 'plan of action' was to consciously disregard the result of his actions that
16 caused greater bleeding, significant compressive atelectasis and dyspnea, and then leave
17 plaintiff in agonizing state of relentless excruciating pain with breathing difficulty for over one
18 week period until transfer to Memorial, well that's when Dr. Ahmed's actions of conduct went
19 from gross negligence to deliberate indifference, exhibiting obduracy and wantonness and
20 causing cruel and unusual punishment to plaintiff.

21 (Pl. Mot. at 26, ECF No. 128.)

22 In deciding a motion for summary judgment, a court may not resolve conflicting evidence.
23 Soremekun v. Thrifty Payless, Inc., 509 F.3d at 984. Rather, summary judgment may be granted only
24 when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter
25 of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986). Plaintiff has
26 failed to carry his initial burden of demonstrating that summary judgment is proper and that no
27 reasonable trier of fact could find other than for him.

28 Defendant has presented expert testimony by Dr. Wachtel who declares that Dr. Ahmed fully
and completely met the applicable standard of care in all aspects of the care and treatment he provided
to Plaintiff at all times. (Wachtel Decl. ¶ 8.) Although Plaintiff disputes whether Defendant Dr.

1 Ahmed's care and treatment was deliberately indifferent, Defendant's evidence creates a genuine
2 dispute of material fact regarding whether Defendant acted reasonably in treating Plaintiff while at
3 Mercy Hospital which precludes the grant of summary judgment in favor of Plaintiff. Based on the
4 evidence presented, Plaintiff has failed to demonstrate, as a matter of law, that there is no triable issue
5 of material fact as to whether or not Dr. Ahmed was deliberately indifference to a serious medical for
6 Plaintiff. Accordingly, Plaintiff's motion for summary judgment as a matter of law must be denied.

7 **C. Defendant Ahmed's Motion for Summary Judgment**

8 Defendant Dr. Ahmed argues the undisputed demonstrates that he met the applicable standard
9 of care in all respects during the care and treatment rendered to Plaintiff. Further, nothing Defendant
10 Dr. Ahmed did or did not do was, to a reasonable degree of medical probability, a substantial factor in
11 causing plaintiff's alleged injuries or making them worse. As there was no professional / medical
12 negligence on behalf of Dr. Ahmed, there was likewise no "deliberate indifference" to any serious
13 medical need of plaintiff by Dr. Ahmed. As such, Plaintiff's claim for a violation of 42 U.S.C. 1983
14 must fail, and judgment must be entered in favor of Dr. Ahmed and against Plaintiff accordingly.

15 1. Defendant's Statement of Undisputed Facts²

16 a. On May 20, 2016, Plaintiff was seen in the emergency department of Mercy Hospital in
17 Bakersfield, California. (Wachtel Decl. ¶ 6(a); Declaration of Kevin Thelen (Thelen Decl.) ¶ 8 & Ex.
18 G, Bates pp. 493-494.)

19 b. Dr. Ahmed also evaluated Plaintiff on May 20, 2016, where he noted the presence of a
20 mass on the patient's right lung seen on imaging study, which Dr. Ahmed believed represented a likely
21 pleural collection of blood that was a hematoma/loculated pneumothorax and led Dr. Ahmed to admit
22 that patient, order a CT scan of the chest, offer symptomatic treatment for the patient, and have
23 Plaintiff undergo incentive spirometry to assist with pulmonary function.³ (Wachtel Decl. ¶ 6(b);
24 Thelen Decl. ¶ 8 & Ex. G, Bates pp. 23-24.)

25
26 ² Hereinafter "DUdF."

27 ³ Plaintiff's assertions relating to other notations made by Dr. Ahmed on this date are beyond the scope of this statement as
28 presented by Defendant.

1 c. Dr. Ahmed prepared handwritten progress notes indicating that the patient was seen on
2 May 21 and May 22, with the May 22 note specifically referencing a plan for an attempted drainage of
3 the patient's hematoma being pending. (Wachtel Decl. ¶ 6(d); Thelen Decl. ¶ 8 & Ex. G, Bates pp.
4 445, 447.)

5 d. On May 23, 2016, Dr. Ahmed noted that Plaintiff had been doing OK with occasional
6 chest pain on the right side, and that same day, a CT-guided hematoma aspiration by needle was
7 performed by Dr. David Condie, which resulted in only 19 mL of clotted blood being aspirated,
8 indicating that the blood had been presented for a period of time and did not represent an ongoing or
9 active/acute bleed. (Wachtel Decl. ¶¶ 6(e), 6(f); Thelen Decl. ¶ 8 & Ex. G, Bates pp. 449, 464.)

10 e. On May 24, 2016, a repeat CT scan of the chest following Dr. Condie's drainage
11 attempt showed little change from the prior scan, and it was determined that Plaintiff would likely
12 need surgical intervention to evacuate the coagulated blood.⁴ (Wachtel Decl. ¶ 6(g); Thelen Decl. ¶ 8
13 & Ex. G, Bates pp. 451, 465.)

14 f. When Dr. Ahmed saw Plaintiff on May 25, 2016, Plaintiff remained stable from a vital
15 signs perspective (albeit with complaints of right sided chest pain and some difficult/labored breathing
16 on exertion), and Dr. Ahmed's plan was to recommend the patient undergo evaluation by a thoracic
17 surgeon for a potential decortication procedure, which would require Plaintiff to be transferred to
18 Bakersfield Memorial Hospital.⁵ (Wachtel Decl. ¶ 6(h); Thelen Decl. ¶ 8 & Ex. G, Bates p. 452.)

19 g. Plaintiff was seen by Dr. Ahmed on May 26 and May 27, seen by Dr. Alpha Anders (on
20 behalf of Dr. Ahmed) on May 28 and May 29, and Plaintiff received breathing treatments, a short
21 course of Rocephin and Levaquin antibiotics, and had regular blood work performed.⁶ (Wachtel Decl.
22 ¶ 6(i); Thelen Decl. ¶ 8 & Ex. G, Bates pp. 453-459.)

23
24 ⁴ Plaintiff cannot attempt to dispute this statement of fact by way of his lay opinion and interpretation of Dr. Ahmed's
25 medical notes. Fed. R. Evid. 701.

26 ⁵ Plaintiff cannot attempt to dispute this statement of fact by way of his lay opinion and interpretation of Dr. Ahmed's
27 medical notes. Fed. R. Evid. 701.

28 ⁶ Plaintiff's assertions relating to the pain he suffered and subsequent medical determinations by other professionals is
beyond the scope of this statement.

1 h. Dr. Ahmed returned and saw Plaintiff on May 30 and May 31, dictating a discharge
2 summary of May 31 that confirmed that during the time Plaintiff was awaiting transfer to Bakersfield
3 Memorial Hospital, he remained stable and had no change in the underlying condition that led to his
4 hospital admission.⁷ (Wachtel Decl. ¶ 6(j); Thelen Decl. ¶ 8 & Ex. G, Bates pp. 460-461.)

5 i. Plaintiff was transferred to Bakersfield Memorial Hospital from Mercy Hospital on
6 May 31, 2016, where Dr. Ahmed was the admitting physician for Plaintiff. (Wachtel Decl. ¶ 6(k);
7 Thelen Decl. ¶ 8 & Ex. G, Bates p. 2; and ¶ 6, Ex. E, Bates p. 19.)

8 j. Plaintiff received a cardiothoracic surgery consultation with Eric Peck, M.D. on June 1,
9 2016, in which Dr. Peck noted that Plaintiff remained stable in light of his large extrapleural
10 hematoma, and the plan was to have Plaintiff undergo a right thoracotomy and evacuation of the
11 pleural hematoma.⁸ (Wachtel Decl. ¶ 6(k); Thelen Decl. ¶ 6 & Ex. E, Bates pp. 17-18.)

12 k. Plaintiff was scheduled for his right thoracotomy and evacuation procedure on June 2,
13 but it did not go forward on that date secondary to an inability to obtain the necessary authorization to
14 move forward with that procedure. (Wachtel Decl. ¶ 6(l); Thelen Decl. ¶ 6 & Ex. E, Bates p. 505.)

15 l. Plaintiff underwent a right thoracotomy and evacuation of his extrapleural hematoma
16 with Dr. Erick Peck on June 3, 2016, and the surgery was successfully completed without
17 complication followed by Plaintiff being taken to the ICU post-operatively in stable condition with
18 later imaging studies showing no evidence of the previously present hematoma being present or
19 identified.⁹ (Wachtel Decl. ¶ 6(m); Thelen Decl. ¶ 6 & Ex. E, Bates pp. 514-515, 522-523.)

20 m. Dr. Ahmed saw Plaintiff on June 4 (post-operative day one), and Plaintiff was stable
21

22 _____
23 ⁷ Plaintiff's interpretation of the medical notes and opinion as to his stability and medical condition do not dispute this
24 statement of fact as presented by Defendant. Fed. R. Evid. 701. Furthermore, subsequent medical determinations are
beyond the scope of this statement.

25 ⁸ Plaintiff contends that Dr. Peck's handwritten notation of the medical evaluation on June 1, 2016, states that he was not
26 stable. However, Plaintiff is not qualified to interpret Dr. Peck's handwritten notations, and there is no evidence beyond
27 Plaintiff's lay interpretation that Dr. Peck's handwritten notation states "Not stable" versus "HCT" meaning "hematocrit
stable" which is consistent with the dictated notes by Dr. Peck and Dr. Wachtel's interpretation. Therefore, this fact
remains undisputed.

28 ⁹ Plaintiff's assertions and interpretation of the medical notes are beyond the scope of this statement.

1 and doing well such that he was cleared by cardiothoracic surgery to be moved from the ICU to a
2 telemetry floor. (Wachtel Decl. ¶ 6(n); Thelen Decl. ¶ 6 & Ex. E, Bates p. 506.)

3 n. A chest x-ray of June 5, 2016 showed no interval change from the prior June 4 chest x-
4 ray, which meant Plaintiff did not begin to experience any acute bleeding following surgery with Dr.
5 Peck, and an ultrasound of the lower extremities performed on June 6 showed no deep vein thrombosis
6 (“DVT”) in either lower extremity.¹⁰ (Wachtel Decl. ¶ 6(o); Thelen Decl. ¶ 6 & Ex. E, Bates pp. 516-
7 517.)

8 o. Plaintiff was discharged from Bakersfield Memorial Hospital back to correctional
9 custody by Dr. Ahmed on June 7, 2016, and at the time of discharge, Plaintiff’s white blood cell count
10 was normal, his chest tubes had been removed, his hematoma had completely dissolved, he was
11 oxygenating well on room air, and he was discharged with Levaquin, an inhaler, Motrin, and Norco
12 with a request for follow-up with Dr. Ahmed for a telemedicine consult in 2-4 weeks and to undergo a
13 follow-up chest x-ray.¹¹ (Wachtel Decl. ¶ 6(p); Thelen Decl. ¶ 4 & Ex. E, Bates pp. 2-3.)

14 p. Dr. Ahmed saw Plaintiff by way of telehealth/telemedicine consultation on June 30,
15 2016 wherein Plaintiff complained of occasional right sided chest pain and occasional cough, and Dr.
16 Ahmed requested that Plaintiff continue with his current management and return in two months after
17 an interval chest x-ray was performed. (Wachtel Decl. ¶ 6(q); Thelen Decl. ¶ 6 & Ex. C, Bates p. 1.)

18 q. It appears that June 30, 2016 was the last involvement that Dr. Ahmed had in Plaintiff’s
19 care and treatment relating to his right pulmonary issues. (Wachtel Decl. ¶ 6(q).)

20 2. Analysis of Defendant’s Motion

21 As previously stated, while the Eighth Amendment of the United States Constitution entitles
22 Plaintiff to medical care, the Eighth Amendment is violated only when a prison official acts with
23 deliberate indifference to an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d at 985;
24 Wilhelm v. Rotman, 680 F.3d at 1122; Jett v. Penner, 439 F.3d at 1096. Plaintiff “must show (1) a
25 serious medical need by demonstrating that failure to treat [his] condition could result in further
26

27 ¹⁰ Plaintiff’s assertions and interpretation of the medical notes are beyond the scope of this statement.

28 ¹¹ Plaintiff’s assertions and interpretation of the medical notes are beyond the scope of this statement.

1 significant injury or the unnecessary and wanton infliction of pain,” and (2) that “the defendant’s
2 response to the need was deliberately indifferent.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at
3 1096). The requisite state of mind is one of subjective recklessness, which entails more than ordinary
4 lack of due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted); Wilhelm, 680 F.3d at
5 1122.

6 “A difference of opinion between a physician and the prisoner – or between medical
7 professionals – concerning what medical care is appropriate does not amount to deliberate
8 indifference.” Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d at 242), overruled in part on
9 other grounds, Peralta, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122-23 (citing Jackson v.
10 McIntosh, 90 F.3d at 332. Rather, Plaintiff “must show that the course of treatment the doctors chose
11 was medically unacceptable under the circumstances and that the defendants chose this course in
12 conscious disregard of an excessive risk to [his] health.” Snow, 681 F.3d at 988 (citing Jackson, 90
13 F.3d at 332) (internal quotation marks omitted).). In addition, “[m]edical malpractice does not
14 become a constitutional violation merely because the victim is a prisoner.” Estelle v. Gamble, 429
15 U.S. at 106; Snow v. McDaniel, 681 F.3d at 987-88, overruled in part on other grounds, Peralta v.
16 Dillard, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122.

17 Here, it is undisputed that on May 20, 2016, Plaintiff was seen in the emergency department of
18 Mercy Hospital in Bakersfield, California. (DUdF a.) Dr. Ahmed also evaluated Plaintiff on May 20,
19 2016, where he noted the presence of a mass on the patient’s right lung seen on imaging study, which
20 Dr. Ahmed believed represented a likely pleural collection of blood that was a hematoma/loculated
21 pneumothorax and led Dr. Ahmed to admit that patient, order a CT scan of the chest, offer
22 symptomatic treatment for the patient, and have Plaintiff undergo incentive spirometry to assist with
23 pulmonary function. (DUdF b.) Dr. Ahmed prepared handwritten progress notes indicating that the
24 patient was seen on May 21 and May 22, with the May 22 note specifically referencing a plan for an
25 attempted drainage of the patient’s hematoma being pending. (DUdF c.)

26 On May 23, 2016, Dr. Ahmed noted that Plaintiff had been doing OK with occasional
27 chest pain on the right side, and that same day, a CT-guided hematoma aspiration by needle was
28 performed by Dr. David Condie, which resulted in only 19 mL of clotted blood being aspirated,

1 indicating that the blood had been presented for a period of time and did not represent an ongoing or
2 active/acute bleed. (DUdF d.)

3 On May 24, 2016, a repeat CT scan of the chest following Dr. Condie's drainage attempt
4 showed little change from the prior scan, and it was determined that Plaintiff would likely need
5 surgical intervention to evacuate the coagulated blood. (DUdF e.)

6 When Dr. Ahmed saw Plaintiff on May 25, 2016, Plaintiff remained stable from a vital
7 signs perspective (albeit with complaints of right sided chest pain and some difficult/labored breathing
8 on exertion), and Dr. Ahmed's plan was to recommend the patient undergo evaluation by a thoracic
9 surgeon for a potential decortication procedure, which would require Plaintiff to be transferred to
10 Bakersfield Memorial Hospital. (DUdF f.) Plaintiff was seen by Dr. Ahmed on May 26 and May 27,
11 seen by Dr. Alpha Anders (on behalf of Dr. Ahmed) on May 28 and May 29, and Plaintiff received
12 breathing treatments, a short course of Rocephin and Levaquin antibiotics, and had regular blood work
13 performed. (DUdF g.)

14 Dr. Ahmed returned and saw Plaintiff on May 30 and May 31, dictating a discharge
15 summary of May 31 that confirmed that during the time Plaintiff was awaiting transfer to Bakersfield
16 Memorial Hospital, he remained stable and had no change in the underlying condition that led to his
17 hospital admission. (DUdF h.) Plaintiff was transferred to Bakersfield Memorial Hospital from
18 Mercy Hospital on May 31, 2016, where Dr. Ahmed was the admitting physician for Plaintiff. (DUdF
19 i.)

20 Plaintiff received a cardiothoracic surgery consultation with Eric Peck, M.D. on June 1,
21 2016, in which Dr. Peck noted that Plaintiff remained stable in light of his large extrapleural
22 hematoma, and the plan was to have Plaintiff undergo a right thoracotomy and evacuation of the
23 pleural hematoma. (DUdF j.) Plaintiff was scheduled for his right thoracotomy and evacuation
24 procedure on June 2, but it did not go forward on that date secondary to an inability to obtain the
25 necessary authorization to move forward with that procedure. (DUdF k.)

26 Plaintiff underwent a right thoracotomy and evacuation of his extrapleural hematoma
27 with Dr. Erick Peck on June 3, 2016, and the surgery was successfully completed without
28 complication followed by Plaintiff being taken to the ICU post-operatively in stable condition with

1 later imaging studies showing no evidence of the previously present hematoma being present or
2 identified. (DUdF l.)

3 Dr. Ahmed saw Plaintiff on June 4 (post-operative day one), and Plaintiff was stable
4 and doing well such that he was cleared by cardiothoracic surgery to be moved from the ICU to a
5 telemetry floor. (DUdF m.)

6 A chest x-ray of June 5, 2016 showed no interval change from the prior June 4 chest x-
7 ray, which meant Plaintiff did not begin to experience any acute bleeding following surgery with Dr.
8 Peck, and an ultrasound of the lower extremities performed on June 6 showed no deep vein thrombosis
9 (“DVT”) in either lower extremity. (DUdF n.)

10 Plaintiff was discharged from Bakersfield Memorial Hospital back to correctional custody by
11 Dr. Ahmed on June 7, 2016, and at the time of discharge, Plaintiff’s white blood cell count was
12 normal, his chest tubes had been removed, his hematoma had completely dissolved, he was
13 oxygenating well on room air, and he was discharged with Levaquin, an inhaler, Motrin, and Norco
14 with a request for follow-up with Dr. Ahmed for a telemedicine consult in 2-4 weeks and to undergo a
15 follow-up chest x-ray. (DUdF o.)

16 Dr. Ahmed saw Plaintiff by way of telehealth/telemedicine consultation on June 30,
17 2016 wherein Plaintiff complained of occasional right sided chest pain and occasional cough, and Dr.
18 Ahmed requested that Plaintiff continue with his current management and return in two months after
19 an interval chest x-ray was performed. (DUdF p.) It appears that June 30, 2016 was the last
20 involvement that Dr. Ahmed had in Plaintiff’s care and treatment relating to his right pulmonary
21 issues. (DUdF q.)

22 Defendant submits the expert opinion of Dr. Andrew Wachtel in support of his motion.
23 According to his curriculum vitae, Dr. Wachtel received his Bachelor of Science degree in biology
24 from Rensselaer Polytechnic Institute in Troy, New York in 1981. He also received his medical
25 degree from Albany Medical College in Albany, New York in 1981. He completed his medical degree
26 with an internship and residency between July of 1981 and June of 1984 at Long Island Jewish-
27 Hillside Medical Center. He then underwent subspeciality fellowship training in pulmonary diseases
28 at Cedars-Sinai Medical Center in Los Angeles, California from July 1984 to June 1986. He is board

1 certified American Board of Internal Medicine in the fields of internal medicine, pulmonary diseases,
2 and critical care medicine.

3 From 1986 to present, Dr. Wachtel is in private practice at Cedars-Sinai Medical Center.
4 (Wachtel Decl. Ex. A.) He has given several lectures, written general research papers and abstracts
5 peer review, and conducted several research studies as principal or sub-investigator. (Id.) The Court
6 finds that Dr. Wachtel may opine on the evaluation, care, and treatment of Plaintiff rendered by Dr.
7 Ahmed.¹² Dr. Wachtel possesses knowledge of the standard of professional learning, skill, and care
8 required of a physician in the fields of internal medicine, pulmonary diseases, and critical care
9 medicine, and based upon his education, training, experience and qualifications, he is thoroughly
10 familiar with the degree of learning and skill ordinarily possessed by reputable medical doctors in
11 those fields in the State of California, including the San Joaquin Valley, where Plaintiff was treated by
12 Dr. Ahmed. In addition, Dr. Wachtel is qualified to testify as to whether Defendant caused Plaintiff's
13 alleged injuries. See, e.g., Brown v. Pac. Gas & Elec. Co., Case No. EDCV 16-0654 DMG (KKx),
14 2018 WL 5270494, at *7 (C.D. Cal. June 25, 2018) (citing Sanderson v. Int'l Flavors & Fragrances,
15 Inc., 950 F. Supp. 981, 1003 (C.D. Cal. 1996)). In sum, the Court finds that Dr. Wachtel's declaration
16 is admissible as to whether the care rendered by Dr. Ahmed breached the standard of care. Further, the
17 Court concludes that Dr. Wachtel is qualified to testify as to whether Dr. Ahmed's care caused

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19 ¹² Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where:

- 20 (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand
21 the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the
22 testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

23 Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if the expert is qualified and if the testimony is both
24 relevant and reliable. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993); see also Hangarter v. Provident
25 Life & Acc. Ins. Co., 373 F.3d 998, 1015 (9th Cir. 2004). Rule 702 "contemplates a *broad conception* of expert
26 qualifications." Hangarter, 373 F.3d at 1018 (emphasis in original). Courts consider a purported expert's knowledge, skill,
27 experience, training, and education in the subject matter of his asserted expertise. United States v. Hankey, 203 F.3d 1160,
1168 (9th Cir. 2000); see also Fed. R. Evid. 702. Under the reliability requirement, the expert testimony must "ha[ve] a
28 reliable basis in the knowledge and experience of the relevant discipline." Primiano v. Cook, 598 F.3d 558, 565 (9th Cir.
2010). To ensure reliability, the Court "assess[es] the [expert's] reasoning or methodology, using as appropriate such
criteria as testability, publication in peer reviewed literature, and general acceptance." Id. at 564.

1 Plaintiff harm. Trujillo v. Cty. of Los Angeles, 751 F.App'x 968, 970-71 (9th Cir. 2018) (“Expert
2 witnesses may offer opinions on matters of which they do not have firsthand knowledge so long as it is
3 permissible in their discipline.”) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592
4 (“[A]n expert is permitted wide latitude to offer opinions, including those that are not based on
5 firsthand knowledge or observation.”)).

6 There is no dispute that plaintiff had a serious medical need while an inmate at Mercy
7 Southwest Hospital and Bakersfield Memorial Hospital between May 20, 2016 and June 7, 2016.
8 Therefore, there is no genuine issue of material fact as to the first prong of Plaintiff's deliberate
9 indifference claim. The only remaining issue is whether there is a genuine issue of material fact
10 concerning Defendant's failure to respond to Plaintiff's medical need in a manner that caused him
11 harm in violation of the Eighth Amendment. Jett, 439 F.3d at 1096.

12 Upon Plaintiff's transfer to Mercy Hospital, Dr. Ahmed examined Plaintiff in a timely and
13 appropriate manner, and made the decision to admit Plaintiff which Dr. Wachtel deems to be wholly
14 reasonable and within the applicable standard of care. (Wachtel Decl. ¶ 7(a).) While Plaintiff was at
15 Mercy Hospital, Dr. Ahmed arranged for the appropriate consultations with specialists in a timely
16 manner to treat Plaintiff and Dr. Wachtel opines that the medical determinations by Dr. Ahmed met
17 the applicable standard of care. (Wachtel Decl. ¶¶ 7(b), 7(c).) Indeed, it is undisputed that Plaintiff
18 was seen on a daily basis by either Dr. Ahmed or Dr. Alpha Anders prior to Plaintiff's transfer to
19 Bakersfield Memorial Hospital. (DUdF c, d, e, f, g, h.) During his time at Mercy Hospital, Plaintiff's
20 vital signs remained stable at all times and he was never in any kind of hemodynamic distress.
21 Wachtel Decl. ¶ 7(c).) Dr. Ahmed initially contacted interventional radiologist David Condie, M.D. to
22 consult with Plaintiff in an attempt to initiate a needle aspiration of the right lung mass on May 23,
23 2016, which is a less invasive procedure than a thoracotomy. (Wachtel Decl. ¶ 7(b).) When the
24 needle aspiration unfortunately failed to remove the hematoma, Dr. Ahmed searched for and finally
25 found a cardiothoracic surgeon willing to consult with Plaintiff, which resulted in a right thoracotomy
26 and evacuation of his extrapleural hematoma with Dr. Peck. (Id.) There is no evidence that Dr.
27 Ahmed's actions or lack thereof unreasonably delayed the transfer process or hematoma evacuation
28 procedure performed by Dr. Peck on June 3, 2016. As noted by Dr. Peck, the hematoma represented a

1 possible source of infection (Plaintiff had been receiving prophylactic antibiotics at Mercy Hospital),
2 in addition it was causing significant compressive atelectasis of the right upper lobe of the lung. Dr.
3 Wachtel opines that the nature of the hematoma evacuation procedure by Dr. Peck, and any potential
4 difficulties or possible complications that could be encountered (of which no evidence exists) did not
5 change from May 24 to June 3, 2016, and Plaintiff's care, treatment, and surgical plan would have
6 remained the same at any point in time between May 24 and June 3. (Wachtel Decl. ¶ 7(e).)

7 After the right thoracotomy and evacuation of the extrapleural hematoma by Dr. Peck on June
8 2, 2016, Plaintiff was evaluated by Dr. Ahmed at Bakersfield Memorial Hospital until his discharge
9 four days later on June 7, 2016. (Wachtel Decl. ¶ 7(f).) During this time, Plaintiff's bronchitis was
10 appropriately managed with antibiotics and Plaintiff was discharged on room air—not needing oxygen
11 from another source—which indicated he had no significant compromise to his respiratory system at
12 that time, which was a notable improvement from his initial presenting condition. (Wachtel Decl. ¶
13 7(f).)

14 Upon discharge from Bakersfield Memorial Hospital, Dr. Ahmed provided appropriate
15 medications which included Levaquin, Xopenex inhaler, Motrin, and Norco, along with a request for
16 incentive spirometry at the correctional infirmary, and a request for a telemedicine follow-up with Dr.
17 Ahmed in 2-4 weeks. (Wachtel Decl. ¶ 7(g).) The telemedicine follow-up examination with Dr.
18 Ahmed took place on June 30, 2016, and Plaintiff complained of occasional right chest pain and
19 occasional cough. Dr. Ahmed requested that Plaintiff continue his current management and was
20 instructed to return for a follow-up visit in two months with an interval chest x-ray. No documented
21 follow-up is noted, and it appears that this was the last involvement that Dr. Ahmed had in Plaintiff's
22 care and treatment relating to his right pulmonary issues. (Wachtel Decl. ¶ 6(q).)

23 Dr. Wachtel opines that to a reasonable degree of medical probability, there is no indication that
24 during the time between Dr. Condie's needle aspiration at Mercy Hospital on May 23, 2016, and
25 Plaintiff's transfer to Bakersfield Memorial Hospital on May 31, 2016, Plaintiff suffered any injury,
26 which was confirmed by serial imaging studies done that showed no significant change to the right
27 extrapleural fluid collection the right upper lung. (Wachtel Decl. ¶ 7(c).) Further, contrary to
28 Plaintiff's argument, there is no evidence from the imaging studies from May 23 to May 31, 2016 that

1 any passage of time resulted in a larger hematoma formation or any condition or progression of any
2 existing condition that could have made Plaintiff’s surgery with Dr. Peck more difficult or risky.
3 (Wachtel Decl. ¶ 7(d).) Lastly, Dr. Wachtel opines that to a reasonable degree of medical probability,
4 there is nothing Dr. Ahmed did or did not do that played a substantial factor in causing any injury,
5 harm, or damage to Plaintiff because transfers involving patients who are in corrections custody are
6 inherently complicated due to coordination issues with insurance, the correctional institution, and the
7 receiving hospital.¹³ (Wachtel Decl. ¶ 7(d).)

8 The Court finds that Defendant Dr. Ahmed has met his initial burden of informing the Court of
9 the basis for his motion, and identifying those portions of the record which he believes demonstrate
10 the absence of a genuine issue of material fact. The burden therefore shifts to Plaintiff to establish the
11 existence of a genuine issue of material fact with respect to his claims of inadequate medical care. See
12 Matsushita Elec. Indus., 475 U.S. 573, 586 (1986).

13 In opposition, Plaintiff attempts to present his own personal opinions and interpretation of the
14 medical records and evidence to opine as to the reasonableness of Dr. Ahmed’s medical treatment.
15 Plaintiff’s attempt to do so is improper and Plaintiff’s reliance on Behr v. Redmond, 193 Cal.App.4th
16 517 (2011) is misplaced. While a lay witness may generally testify as to his of knowledge of his
17 disease, injuries, or physical condition, Behr v. Redmond, 1983 Cal.App.4th at 528, a lay witness may
18 not testify as to matters based on scientific, technical, or other specialized knowledge within the scope
19 of an expert witness. Fed. R. Evid. 701, 702; see also United States v. Conn., 297 F.3d 548, 554 (7th
20 Cir. 2002) (lay witness testimony generally summarizes first-hand sensory observations and “is not to
21 provide specialized explanations or observations that an untrained layman could not make if
22 perceiving the same acts or events.”) (quoting United States v. Peoples, 250 F.3d 630, 641 (8th Cir.
23 2001)); Hanger Prosthetics & Orthopedics, Inc. v. Capstone, Orthopedic, Inc., No. 2:06-cv-02879-
24 GEB-KJM, 2008 WL 2441067, at *2 (E.D. Cal. June 13, 2008) (“The distinction between lay and
25 expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday
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28 ¹³ “Causation is, of course, a required element of a § 1983 claim.” Estate of Brooks v. United States, 197 F.3d 1245, 1248
(9th Cir. 1999); Lee v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

1 life, while expert testimony results from a process of reasoning which can be mastered only by
2 specialists in the field.”) (internal punctuation and citations omitted).

3 Plaintiff attempts to bolster his claim that Dr. Ahmed provided inadequate treatment by pointing
4 to a handwritten notation by Dr. Peck on June 1, 2016, which he contends states Plaintiff was “not
5 stable.” (Pl. Opp’n, Ex. C3.) Plaintiff contends that “though all retyped care notes list plaintiff as
6 stable, on 6-1-16, upon arrival to Memorial hospital, doctors had written note clearly states plaintiff
7 ‘was not stable.’” (Pl. Opp’n at 7-8, ECF No. 134.) However, Dr. Wachtel declares that, “Dr. Peck
8 noted following his evaluation of the patient that he remained stable in light of his large extrapleural
9 hematoma.” (Wachtel Decl. ¶ 6(k).) Plaintiff argues that Dr. Wachtel “leaves out important material
10 facts” and “does not testify to truth” for fraudulent purposes because, “Dr. Wachtel, is employed [sic]
11 by the defense and predispositioned [sic] to ‘actual bias’ to decide a cause or issue in a certain way.
12 There for [sic] Dr. Wachtel, ‘lacks the ability to remain objective’ and exercise his functions
13 impartially in a particular case, and that is a huge disqualifying factor. Dr. Wachtel is nothing more
14 than a hired gun for the defense.”¹⁴ (Pl. Opp’n at 15, ECF No. 134.)

15 Here, it is undisputed that Dr. Peck’s consultation note states, “[Plaintiff’s] hematocrit stable in
16 his vital signs are stable.” (DUdF j; Pl. Opp’n, G2.) Dr. Peck’s assessment was based upon his review
17 of the clinical tests and physical examination of Plaintiff. (Wachtel Decl., Ex. B; Thelen Decl., Exs.
18 C-G.) Dr. Wachtel’s declaration and interpretation is consistent with Dr. Peck’s notations, and there is
19 no evidence to the contrary. Plaintiff simply misinterprets Dr. Peck’s shorthand “hematocrit stable” or
20 (“HCT stable), which communicated (and consistent with his typed notes) that Plaintiff was not
21 actively bleeding, as a patient with an active bleed would not have a stable hematocrit level. (DUdF j;
22 Wachtel Decl. ¶¶ 6(f), 6(j).)

23 Plaintiff also contests the medical records which indicate that following the right thoracotomy
24 and evacuation of his extrapleural hematoma, he was taken to the ICU in stable condition with
25 subsequent imaging studies showing no sign of the previously present hematoma. Plaintiff argues that
26

27 ¹⁴ Plaintiff’s argument that Dr. Wachtel is biased goes to the weight and credibility of his testimony, not whether it is
28 admissible. In re Unisys Sav. Plan Litig., 173 F.3d 145, 166 n.11 (3d Cir. 1999) (expert witnesses cannot be excluded
solely on the basis of bias.).

1 “stable is not a science, but an individual perspective.” (Pl. Opp’n at 12, ECF No. 134.) However, the
2 opinions by medical doctors, including Dr. Peck, Dr. Ahmed, and Dr. Wachtel, are based on their
3 professional qualifications, and there is no evidence that Dr. Peck was not wholly qualified to opine
4 that Plaintiff was hematocrit stable. Plaintiff also argues that, “All Dr. Wachtel declares is medical
5 probabilities, which by definition is only a likelihood [sic], something that could be or might not be.”
6 (Pl. Opp’n at 86, ECF No. 134.) However, Dr. Wachtel’s opinions are based on a medical probability
7 which is different than medical possibility for purposes of causation. See, e.g., Bromme v. Pavitt, 5
8 Cal.App.4th 1487, 1498 (1992) (“[t]hat there is a distinction between a reasonable medical
9 ‘probability’ and a medical ‘possibility’ needs little discussion. There can be many possible ‘causes,’
10 indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause
11 only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes
12 more likely than not that the injury was a result of its action. This is the outer limit of inference upon
13 which an issue may be submitted to the jury. [Citation.]”) (citations omitted); Jones v. Ortho
14 Pharmaceutical Corp., 163 Cal.App.3d 396, 402-03 (2d Dist. 1985) (with regard to causation, plaintiff
15 must prove within a reasonable medical probability based on competent medical testimony that
16 defendant's negligent care caused his injury); Wilson v. California Dept. of Corrections, No. 2:02-cv-
17 2169 MCE KJM P, 2006 WL 707434, at *5 (E.D. Cal. Mar. 21, 2006) (same). As stated above, Dr.
18 Wachtel’s expert testimony is admissible and may be considered in ruling on Defendant’s motion.
19 the Court cannot ignore his opinions. See Primiano v. Cook, 598 F.3d at 567 (admitting expert's
20 testimony with “sufficient basis in education and experience”).

21 Drawing all reasonable inferences from the evidence submitted in Plaintiff's favor, the Court
22 concludes that Plaintiff has not submitted sufficient evidence at the summary judgment stage to create
23 a genuine issue of material fact with respect to his claim that Defendant Dr. Ahmed violated his rights
24 under the Eighth Amendment. Because Plaintiff lacks the foundation or qualifications to draw such
25 conclusions based on the medical notes and records during his visits with Dr. Ahmed, his claims that
26 certain medical treatment was improper is at best speculation. The record does not support an
27 inference that the course of treatment Dr. Ahmed chose was medically unacceptable under the
28 circumstances and amounted to deliberate indifference. Plaintiff has not submitted any evidence to

1 cast doubt on Defendant Dr. Wachtel’s unrefuted expert testimony which establishes that the medical
2 care and treatment that was rendered to Plaintiff by Dr. Ahmed was medically appropriate under the
3 circumstances and within the standard of care and skill ordinarily exercised by reputable members of
4 the medical profession at that time. Further, there is nothing that Dr. Ahmed either did or did not do
5 that, to a reasonable degree of medical probability, was a substantial factor in causing harm or injury
6 to Plaintiff. (Wachtel Decl. ¶ 8.) Accordingly, there is no evidence from a which a trier of fact could
7 conclude that Dr. Ahmed not only purposefully failed to treat plaintiff, but also that he was harmed by
8 their indifference. Consequently, Defendant’s motion for summary judgment should be granted.

9 **IV.**

10 **RECOMMENDATIONS**

11 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 12 1. Defendant’s motion for summary judgment be granted; and
- 13 2. Judgment be entered in favor of Defendants.

14 These Findings and Recommendations will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
16 being served with these Findings and Recommendations, the parties may file written objections with
17 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
18 Recommendations.” The parties are advised that failure to file objections within the specified time
19 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
20 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21
22 IT IS SO ORDERED.

23 Dated: June 16, 2021



24 UNITED STATES MAGISTRATE JUDGE